IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Civil Writ Petition No.406 of 2007

Shri Vijaykumar Sakharam Bamne & ors.
through his Constituted Attorney
Mrs.Neha Sudhir Bamne Petitioner

Vs.

Smt. Vanita Waman Shetye & ors. Respondents

Mr.Mahesh Shroff i/b. Mr.Tejesh Dande for petitioner.

Mr.Atul Rajadhyaksha, Sr.Counsel with Mr.M.G.Kulkarni
and Mr.V.D.Survey for respondents.

CORAM: B.H.MARLAPALLE, J.

June 8, 2007.

P.C.

1. Heard Mr.Shroff holding for Mr.Tejesh Dande, the learned counsel for the petitioners. This petition is a classic case of a frivolous litigation being filed by the petitioners from time to time and the impugned order is an interlocutory order passed in the pending appeal i.e. Appeal No.485 of 2005 rejecting the application at Exhibit 9 filed by the appellants to bring on record some additional

documents for the first time before the lower Appellate Court.

2. Short Cause Suit No.2550 of 1960 came to be decreed in terms of the consent decree after about nine years i.e. on 16/12/1969 and twenty years later the present petitioners approached the Small Causes Court at Mumbai in RAD Suit No.384 of 1989 for two separate reliefs i.e. (i) to declare that they are lawful sub-tenants in respect of the suit premises i.e. Shop Nos.A2-2A on the ground floor of Kantawalla Building no.1, Naigaum Cross Road, Dadar, Mumbai and (ii) to declare that the Consent Decree dated 16/12/1969 passed in Short Case Suit No.2550 of 1960 was a nullity and, therefore, could not be enforced against the plaintiffs. The learned Judge of the Small Causes Court dismissed the suit vide his judgment and order dated 6/6/2005 and, therefore, Appeal No.485 of 2005 has been filed before the Division Bench of the Small Causes Court and the same is pending.

. It is pertinent to note that Suit No.2022 of 1985 was filed before the City Civil Court at Mumbai and twofold relief was prayed for. Firstly a

declaration was sought that the defendant in the suit was not the tenant in respect of the suit premises and the plaintiffs were sub-tenants of Bai Habibabai Shaikh Kasam and, therefore, the concerned decree was a nullity and could not be enforced against them. The second relief was that under the Consent Terms the defendant had granted a licence in their favour in respect of the suit premises, the same being not less than a room for a fee and that licence was subsisting on 1st February 1973 and therefore, they were deemed to be tenants under Section 15(a) of the Rent Act and consequently protected under the said Act and, therefore, the consent decree could not be executed against them. The said suit was disposed on 13th December 1988 and the plaint was returned to be presented to the appropriate Court because the first relief was not pressed for and for the second relief the plaint was directed to be presented in the Small Causes Court and that is how the said suit was re-registered as RAD Suit No.384 of 1989.

3. The application at Exhibit 9 was made to bring on record purportedly the rent receipts for the period from 1962-65 which were claimed to have been recovered from the papers left behind by Mrs.

Laxmibai Bamne, the mother of the plaintiff nos.1 and 2. The defendants filed their say to the application and opposed the same. The defendants referred to the Scheme of Order XLI Rule 27 of CPC and pointed out that in the normal course the parties to appeal are not entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but there are three exceptions to this general rule viz. (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; (b) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; and (c) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause.

. As per the defendants, none of these conditions were satisfied and, therefore, the application was required to be rejected.

4. The lower Appellate Court considered the averments as they appeared before the the trial Court in the pleadings before the trial Court and more particularly the evidence. It noted that the plaintiffs themselves had admitted that the rent receipts were being issued in the name of the defendant and if that was the position the purported rent receipts in the name of Laxmibai could be disbelieved. It further noted that at the first place the plaintiffs claim to be sub-tenants and in the alternative they claim to be deemed tenants and, therefore, the documents sought to be placed on record were not relevant for pronouncement of the judgment in the appeal.

5. Even otherwise this being an interlocutory order, if the appellants fail in the appeal they are not estopped from raising the grounds to challenge the appellate Court's order even on the points raised in this petition against the impugned order in addition to challenge the said order on merits. I am, therefore, satisfied that there is no case made out to cause interference in the impugned order under the supervisory jurisdiction of this Court under Article 227 of the Constitution.

6. The petition is rejected summarily.

7. Hearing in the appeal is expedited.

(B.H.MARL